IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 177 OF 2005
IN
APPEAL FROM ORDER NO. 533 OF 2005

Municipal Corporation of
Gr. Mumbai. ..Appellants

Vs.

Shreeram Gangaram Jaiswal
and anr. ..Respondents

Ms. Geeta S. Jogalekar for Appellants-BMC.
Mr. Anil Singh for Respondents.

CORAM: B.H. MARLAPALLE, J.

Date : June 29, 2005.

P.C.:

1. Heard Ms. Jogalekar the learned counsel for the appellants and Mr. Singh the learned counsel for the respondents.

2. Rule was granted in this application by order dated 14/2/2005.

3. The impugned order in A.O. No.533 of 2005 passed by the learned Judge of the City Civil Court at Mumbai making the Notice of Motion No.2387 of 2003

absolute in terms of prayer clause (a) itself shows that the plaintiff had erected four cabins of P.C.O. booth and fruit vendor shed in the open space and these were removed by the Corporation officials on 5/9/2002, 4/10/2002, 1/11/2002 and 2/11/2002. By misusing the injunction order in Suit No.6112 of 2002 the plaintiff installed four telephone booths and covered the compulsory open space of the premises. It was also pointed out by the Corporation that suit bearing No.6112 of 2002 and suit bearing No.667 of 2004 were filed by the plaintiff in addition to Suit No.1451 of 2004.

4. In L.C. Suit No.2069 of 2003 in which Notice of Motion No.2387 of 2003 was moved, the Corporation had raised a preliminary issue regarding maintainability of the suit in view of the provisions of Section 149 of the Maharashtra Regional Town Planning Act, 1966 (M.R.T.P. Act for short). The learned Judge of the trial court in the impugned order held that the Corporation had issued only notice under Section 55 of the M.R.T.P. Act, 1966 and it was not an order and thus rejected the preliminary ground

raised by the Corporation. Section 55 of the M.R.T.P. Act clearly shows that the proceedings initiated thereunder are summary proceedings and perusal of the order dated 7/4/2003 clearly shows that it was an action under Section 55 of the M.R.T.P. Act, 1966, though it was styled as notice under the said Section. It is, therefore, clear that there is a prima facie case made out by the Corporation in favour of its preliminary objection regarding the tenability of the suit. If the suit itself is not tenable, the Notice of Motion cannot be allowed under Order 39 Rule 1 and 2 of C.P.C.

5. Hence, rule is made absolute by staying the impugned order dated 3/11/2004 during the pendency of this appeal.

. Mr. Singh the learned counsel for the respondents makes an oral application for stay of this order. The application is hereby rejected.

(B.H. Marlapalle,J.)